2. The Act Does Not Protect The UFCW's Pre-Conceived Series Of Staged National Day/Week Of Actions Walk-Offs/Demonstrations.

As a general rule, the Act protects employees who engage in a concerted work stoppage to protest a discrete working condition concern. *See NLRB v. Washington Aluminum*, 370 U.S. 9 (1962). However, that protection does not extend to intermittent work stoppages. *See Care Center of Kansas City*, 350 NLRB 64 (2007); *Embossing Printers, Inc.*, 268 NLRB 710 (1984); *Pacific Tel. & Tel. Co.*, 107 NLRB 1547 (1954). An "intermittent work stoppage" constitutes unprotected activity even though the objective of the work stoppage remains lawful. *Embossing Printers*, 268 NLRB at 723; *Pacific Tel.*, 107 NLRB at 1549-50. An employer may discipline an employee for engaging in an intermittent work stoppage. *Id.*

The Board considers intermittent work stoppages unprotected because such actions constitute neither work nor strike. *See Embossing Printers,* 268 NLRB at 722-23; *Pacific Tel.*, 107 NLRB at 1549. By engaging in intermittent work stoppages, the employees seek to gain all of the benefits of a strike without the detriments. *See Care Center*, 350 NLRB at 68. Further, the Board recognizes that unions use intermittent work stoppages to improperly harass employers and create a state of confusion and an inability to plan business activities. *See Pacific Tel.*, 107 NLRB at 1548; *Land Mark Elec.*, 1996 WL 323648 at *2 (NLRB G.C. Op., May 17, 1996) (concluding that a union activist orchestrated intermittent work stoppages to harass the employer into dealing with the union). The Board has reasoned that, although employees may strike, employees may not unilaterally impose schedules and operating hours on employers, dictating the terms and conditions of employment, by hit-and-run tactics. *See Care Center*, 350 NLRB at 68; *Embossing Printers*, 268 NLRB at 723.

The Board endorsed a three-factor test to identify unprotected IWS in *Care Center.* There, employees engaged in unprotected work stoppages where they conducted two, one-day strikes several weeks apart because (1) the work stoppages were intermittent, (2) the employees acted in furtherance of a union's single plan or strategy, and (3) neither the employees nor the union gave any indication that the strikes would not continue. 350 NLRB at 64, 67-68 (*citing Honolulu Rapid Transit Co.*, 110 NLRB 1806 (1954)). Accordingly, the employer there did not violate the Act by disciplining the intermittent work stoppage strikers who, among other things, violated its no-call\no-show policy on the strike days. *Id.* Notably, the *Care Center* test does not require a plan to disrupt or harass an employer, although evidence of a such a plan surely meets the second criteria.

All three factors are present here:

> (1) the UFCW's "strikes" are intermittent and unpredictable (a day here, a few days there, "random," depending on the UFCW's or its supporters' whims);
>
> (2) every walk-off described above occurred as part of the UFCW-orchestrated plan to draw media attention to its raise-the-bar rhetoric (including its generic "retaliation" claims) with disruptive in-store demonstrations using the walk-off (or walk-back) as a

> media backdrop; significantly, none of the work stoppages addressed any distinct employer action or problem at any particular store and the UFCW's generic IWS campaign message never changed; and
>
> (3) the UFCW and its supporters not only do not give any indication that the intermittent strikes will not continue, they affirmatively promise that the IWS *will* continue.

As such, the Act does not protect the UFCW's IWS, including the IWS engaged in during May/June, 2013 (assuming the June "education" event somehow constitutes a "labor" work stoppage). *See also WestPac Elec., Inc.*, 321 NLRB 1322, 1360 (1996); *United States Service Indus.*, 315 NLRB 285, 285 (1994); and *Farley Candy Co.*, 300 NLRB 849, 849 (1990) for additional on-point authority; *accord The Developing Labor Law*, 1707, John E. Higgins, Jr., Editor-in-Chief (6th ed. 2012) ("[T]he presence of the union [is] the major factor tending to show a plan or pattern.").

Three cases further illustrate why the Act does not protect the UFCW's hit-and-run strike campaign or the JWO Associates' participation in it.

Dallas Glass

The Division of Judges recently issued an instructive IWS decision in *Dallas Glass*, 2013 WL 703258 (NLRB Div. of Judges). In that case, the ALJ summarized the Board's IWS jurisprudence and found that two "salts" engaged in two unprotected IWS "strikes" where they had a "plan to strike, return to work, and strike again" on a "repeated" or "recurrent or intermittent" basis. *Id.* (citing *Farley Candy Co.*, 300 NLRB 849, 849 (1990); *Graphic Arts Local 13-B (Western Pub. Co.)*, 252 NLRB 936, 938 (1980); *NLRB v. Robertson Industries*, 560 F.2d 396, 398 (9th Cir. 1976); *Roseville Dodge, Inc. v. NLRB*, 882 F.2d 1355 (8th Cir. 1989)).

The ALJ particularly pointed out that: (1) the salts did not try to organize their co-workers during the course of the union-orchestrated IWS (*i.e.*, the salts did not strike in pursuit of any evolving organizing effort), and (2) nothing changed in the employees' working conditions between the two IWS hit-and-run strikes, meaning that the two strikes were not discrete events, but part of a plan and pattern. The ALJ explained:

> The only explicitly stated reason for taking action, asserted in connection with the second strike, was to protest employee wages. *Nothing changed* with regard to employee wages from 2007 to the time of the hearing. The recurrent strikes in the interim, therefore, were not even ostensibly in response to discrete employer actions. I find this case similar to *Swope Ridge, supra*, where the Union announced and implemented two work stoppages in a short period in furtherance of contract demands during an ongoing bargaining dispute. The Board found that 'because the bargaining dispute continued with *no evident changed purpose*, there was a reasonable basis for finding that the pattern would continue.' *Id.* at fn. 3. The same rationale applies here; the Respondent's wages did not change, and there is

> no reason to believe the alleged discriminatees' pattern of conduct of intermittent work stoppages would change until they achieved their goal of union recognition and/or area standards pay and benefits. The absence of discrete employment factors and, relatedly, evidence that the strikes were part of a plan by the Union, weigh against protection.

The same rationale applies with equal force here. The UFCW and OURWalmart expressly deny any intent or object of organizing Walmart associates. [*See* UFCW/OURWalmart Settlement Agreement in 26-CP-93377 and the on-going disclaimer on the forrespect.org web page.] Moreover, the UFCW/OURWalmart "strikers'" generic purpose has not changed since October 2012, *i.e.*, respect, better wages, benefits, hours, no retaliation. The form letters have not changed. Even the strikers' messaging about perceived retaliation and "ULP strikes" has not changed; no specifics, no detail: just a generalized, recurrent claim to be engaged in a boilerplate ULP strike (patently scripted by the UFCW to try and avoid the economic-striker replacement scenario). These strikes are not in reaction to discrete acts. The UFCW simply wants its supporters to be able to come and go as they please – neither worker nor striker – as part of a recurrent plan to disrupt individual store operations at the UFCW's whim. And, as described above, UFCW supporters promise, "There's going to be more days that we're going to strike, . . . and it's not going to stop. I'm not *going to stop until they respect us and give us what we want*."

National Steel

The Board dealt with another highly analogous situation in *National Steel and Shipbuilding Co.*, 324 NLRB 499, 499, 505 nn. 13, 15, 526-27 (1997). In that case, the ALJ found – and the Board affirmed – that the Act did not protect the union's intermittent work stoppages. The ALJ explained:

> We are also taught that when employees, or the unions who lead them, seek to bring about a "condition" that involves "neither strike nor work," the employees lose Section 7's protections, especially when they use "intermittent work stoppages," or their equally unprotected kin, "partial strikes," as tactics to achieve such a quasi-strike "condition." A notion of economic "fair play" under our statutory scheme seems to inform these holdings. Thus, the Board has consistently reasoned that, unlike a protected, "unequivocal" strike done to further some work-related protest, such quasi-strike activities should be regarded as beyond Section 7's protections because they involve at their essence an attempt by employees to reap the economic benefits of strike action without their being simultaneously willing "to assume the status of strikers, with its consequent loss of pay and risk of being replaced." Another explanation for the "repeated condemn[ation]" delivered by "[b]oth the Board and the courts" against such less-than-"complete" strike activities appears to be grounded in the notion that they involve a kind of worker insubordination, *i.e.*, a "refusal to work on the terms lawfully prescribed by the employer while remaining on their jobs."

Id. at 526-27.

The ALJ then found that "the March 17 and 19 work stoppages were, indeed, union-orchestrated tactics in a contract-bargaining game plan contemplating other unprotected intermittent or partial strike activity, or threats thereof, calculated not only to 'confuse' NASSCO, but to damage it economically and thereby to achieve the 'benefits' of strike action without assuming the vulnerabilities of a forthright and continuous strike. This is another way of saying that the two March stoppages were integral elements of a union 'plan' or 'strategy' involving precisely the kinds of hit-and-run strike tactics denounced by the Board." With that conclusion in hand, the ALJ determined that "because I have found that the two March stoppages were elements of this unprotected pattern of action, I conclude that the March stoppages were themselves unprotected, no matter that either might have been protected as a bona fide 'protest' if either had occurred in isolation, or in the absence of such a strategy."

The same rationale – and result – applies here where: (1) the multiple UFCW-orchestrated work stoppages are all part of the UFCW's same, unified media-messaging and pressure campaign as evidenced by the striker's uniform use of the UFCW's strike and return-to-work letters, as well as the generic "do better" messaging at strike-related events; (2) the UFCW expressly intends the intermittent strike to harass Walmart "on its busiest days" and damage the Company's image (*see* Concerted Activity Notice), as well as disrupt store operations on the sales floor during the staged "walk-off" or "walk-back" demonstrations (*see* IWS-related demonstration videos at Tab 8); (3) the strikers seek to obtain the benefits of strike action without assuming the vulnerabilities of a forthright and continuous strike; and (4) the UFCW promises to continue the intermittent and "random" work stoppages. *See also, Audubon Health Care Center*, 268 NLRB 135, 137 (1983) ("While employees may protest and ultimately seek to change any term or condition of their employment by striking or engaging in a work stoppage, the strike or stoppage must be complete, that is, the employees must withhold all their services from their employer. *They cannot pick and choose the work they will do or when they will do it.* Such conduct constitutes an attempt by the employees to set their own terms and conditions of employment in defiance of their employer's authority to determine those matters and is unprotected.") (emphasis added).

Pacific Telephone

As described above, the UFCW (through its OURWalmart agent) published and posted its Concerted Activity Notice. In that Notice, the UFCW expressly describes its intent to disrupt Walmart operations with IWS: (1) "these one day strikes or concerted actions may become the new normal and damage the companies [sic] image further"; (2) "You now face the real possibility of multiple call ins (hourly's [sic] working together for a clearly defined and stated on paper, common goal) that will be concentrated around your busiest days such as holidays, special events, weekends, and the first week of the month"; and (3) "These days will be selected at random to protest what we perceive as unfair treatment." The walk-off/walk-back demonstration videos show the real-world disruptive impact of those threats made real. Whether intended or not, those threats and actual disruptions echo a similar union IWS plan that the Board found unprotected in *Pacific Tel. & Tel. Co.*, 107 NLRB 1547, 1548 & n.3 (1954). There, the Board recounted the union's IWS plan:

> Why is the "hit-and-run" tactic successful? Let's take stock. By adopting the surprise hit-and-run picket line, the union taxes management's ability to organize its offices to the utmost. The chain of command in the telephone company is a long one. And telephone supervision is well trained to use no initiative - but wait for orders from the top. *By striking quickly and unexpectedly, the Company has a problem getting its defenses set up.* They can't spare supervisors from other non-struck areas, because they have to carry on normal work. The ones they do gather together reach the picketed place, only to have the picket line gone. *The Telephone Company can't function efficiently in its nation-wide operations if any part of its circulation is cut off.* During a full blown strike all of its operations operate in low gear - but in a hit-and-run attack, most of the company's functions must be maintained. The company accounting records must be maintained, its workers are largely on the job, and the public expects normal service. *Another advantage for the union in this tactic is that most of the workers are on the job, maintaining their financial take home while harassing the company into a state of confusion.* Having suffered no great loss, these workers can aid the men and women who are off the job all the time of the strike. The Hit and Run strike will beat the telephone industry - if properly applied. (First emphasis in original; second and third emphasis added).

Additionally, *Pacific Telephone*, also illustrates that the Act does not protect an individual employee's single walk-off when that walk-off takes place as part of an overall union IWS plan. 107 NLRB at 1552 n. 10. As noted in that case, several employees walked off the job multiple times, but one employee walked out only once in support of the others. *Id.* The Board held that all of the employees had engaged in unprotected intermittent work stoppages. In explaining its holding, the Board stated that the employee who had walked out only once "must have been aware of CWA's plan to engage in intermittent strike activity.... By engaging in a strike on their behalf under these circumstances, McCullouch made common cause with the CWA's unprotected union activity and, we find, must share the status of the other tollmen who participated in it." *Id.*

Thus, just as the Act did not protect the union's plan for disruptive IWS in *Pacific Telephone,* it does not protect OURWalmart's similar plan – or the JWO Associates' participation in it – to engage in IWS designed to damage the Company's image (bad employer, does not pay a "living wage"), disrupt store sales operations (*see* IWS demonstration videos), and hit at random intervals to confuse and harass the Company. *See also NLRB v. Insurance Agents Int'l*, 361 U.S. 477, 492-93 (1960) (the union's pressure tactics across various offices of having employees report late to work on certain days, leave work early on certain days, and refuse to write new business and engage in other work was unprotected under the Act).

E. Store Management Applied Its Attendance/Punctuality Policy To The JWO Associates At Their Stores In A Non-Discriminatory Manner.

Walmart runs a very lean business enterprise with significant focus on matching customer demand with just the right amount of labor. As a result, the Company has a very keen interest in ensuring proper staffing. And Board law recognizes that an employer may support its legitimate business interests in proper staffing levels through attendance rules. *See, e.g., Allied Mechanical Svcs.*, 346 NLRB 326, 327-28 (2006) (employee's frequent absences constituted a legitimate business reason to discharge employee and employer would have discharged employee regardless of employee's union activity); *Neptco, Inc.*, 346 NLRB 18, 18, 27-31 (2005) (employer lawfully discharged employee for work performance and for violating attendance policy); *Venture Packaging, Inc.*, 290 NLRB 1237, 1240-41 (1988) (Board adopted, without comment, ALJ's conclusion that employer rebutted GC's case of discrimination by showing it discharged employee because her "job performance, including attendance, did not measure up to Company standards").

Given the makeup of Walmart's work force, it faces more than its share of attendance challenges. But those challenges also create an overwhelming pool of comparators to demonstrate that Walmart conscientiously applied the same attendance standards and the same rules to the JWO Associates as it did to other similarly-situated associates. With over 6,689 disciplinary and 2,900 discharge comparators – all for attendance-policy violations in the last two years – the UFCW cannot claim disparate treatment. Indeed, in several instances where store managers determined that they could not show substantial consistency in the enforcement of the attendance policy at that time, JWO Associates benefited from their careful analysis and equal treatment as compared to other, similarly-situated associates in that store. *See Avondale Industries*, 329 NLRB 1064, 1066 (1999) ("[I]n the absence of countervailing evidence, such as that of disparate treatment based on protected activity, the Respondent [proves its case] by demonstrating that it has a rule . . . and that the rule has been applied to employees in the past."); *see also Reliable Maintenance*, Advice Memorandum, 2006 WL 5054728, *3 (Case No. 18-CA-18119, October 31 2009) (in upholding the employer's discharge of employees for attendance violations, Advice found "[t]here is also no evidence that the employee was accorded disparate treatment, or punished more severely than similarly situated employees. The Employer presented evidence that it has terminated as many as 140 other employees for similar infractions").

F. JWO Associates Who Received Personal Discussions Did Not Suffer An Adverse Employment Action.

Many associates (16) received no more than "personal discussion" courtesy reminders about their attendance-occurrence status. Those reminders emphasized that the next occurrence could result in discipline, clarifying that the current "reminder" did not constitute discipline. As a matter of law, those courtesy reminders did not constitute an adverse employment action. Where an oral reminder "merely warns an employee of potential performance or behavior problems" and is not part of a "formal disciplinary procedure," it does not qualify as an adverse employment action. *Lancaster Fairfield Comm. Hosp.*, 311 NLRB 401, 403 (1993) (holding

conference report regarding employee's disruptive behavior "constituted nothing more than counseling" and "did not affect any term or condition of employment").

The Board dealt with this precise scenario in *Altercare of Wadsworth Ctr. for Rehab. and Nursing Care*, 355 NLRB No. 96, at *1 (2010). There, the Board noted first that "Verbal counselings or warnings constitute disciplinary action sufficient to support a violation of Section 8(a)(3) where they 'are part of a disciplinary process in that they lay 'a foundation for future disciplinary action against [the employee].'" The Board then held, "The record here does not show that verbal directions are part of the Respondent's progressive disciplinary system. As the judge observed, the parties' collective-bargaining agreement specifically provides that 'verbal counseling and coaching shall not count for purposes of progressive discipline.'" *Id.*

Here, Walmart's Attendance and Coaching for Improvement Policies describe the disciplinary procedure in detail and do not include personal discussions as a step in the disciplinary process. [Tabs 24, 25.] Moreover, the Attendance Policy provides that "if you have three occurrences in a rolling six-month period, you will have the opportunity to have a personal discussion with management regarding your attendance. If you have more than three occurrences in a rolling six-month period, you will be subject to disciplinary action." [Tab 24 (emphasis added).] By not including personal discussions in the Coaching Policy and by specifically separating out personal discussions from subsequent potential discipline in the Attendance Policy, Walmart makes clear that it does not consider personal discussions to constitute a form of discipline. The personal discussion does not lay a foundation for any future discipline (the underlying occurrences – as they aggregate – do that). To the contrary, Walmart uses the personal-discussion reminder policy to help associates avoid discipline.

Accordingly, OURWalmart's Charge further fails as to the following JWO Associates who received personal discussions because they suffered no adverse employment action under the Act: (b) (6), (b) (7)(C) [redacted], and (b) (6), (b) (7)(C) [redacted] *See Northeast Iowa Telephone Co.*, 346 NLRB 465, 476 (2006) (affirming ALJ that employer did not violate the Act when employee suffered no change in terms and conditions of employment).

G. <u>This Charge Does Not Warrant Section 10(j) Consideration</u>.

1. Section 10(j) Relief Is An Extraordinary Remedy That Should Be Requested Only In The Most Egregious Of Circumstances.

The Region has requested that Walmart state its position on the appropriateness of Section 10(j) injunctive relief in this matter. Section 10(j) "is a limited exception to the federal policy against labor injunctions, *reserved only for 'extraordinary' cases* when the remedial purpose of the Act would be frustrated unless immediate action is taken." *Sharp v. Parents in Community Action, Inc.*, 172 F.3d 1034, 1037 (8th Cir. 1999) (emphasis added); *NLRB v. Acker Indus., Inc.*, 460 F.2d 649, 652 (10th Cir. 1972). Said another way, "*Section 10(j) is itself an extraordinary remedy* to be used by the Board only when, in its discretion, an employer or union has committed such egregious unfair labor practices that any final order of the Board will be meaningless or so devoid of force that the remedial purpose of the Act will be frustrated." *Boire*

v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1192 (5th Cir. 1975) (emphasis added). Indeed, under § 10310.6 of the Board's own Case Handling Manual, the Board should seek Section 10(j) relief only in emergency situations.

Accordingly, Section 10(j) relief is available only when an employer has committed some sort of "extraordinary" or "egregious" unfair labor practices that must be addressed even before the employer is allowed a full hearing on the merits. For example, Courts have enjoined employers who refuse to bargain with a union following an election. *See NLRB v. Electro Voice Inc.*, 83 F.3d 1559 (3d Cir. 1996); *Rivera-Vega v. ConAgra, Inc.*, 876 F. Supp. 1350 (D. Puerto Rico 1995); *Gottfried v. Purity Systems, Inc.*, 707 F. Supp. 296 (W.D. Mich. 1988). Likewise, courts have enjoined employers from selling or relocating company operations before the Board has ruled on the merits of unfair labor practice charges. *See Hirsch v. Dorsey Trailers, Inc.*, 147 F. 3d 243 (3d Cir. 1998). Courts have also stopped employers from making unilateral changes to employees' work agreements pending the outcome of unfair labor practice charges. *See Overstreet v. Tucson Ready-Mix, Inc.*, 11 F. Supp. 2d 1139 (D. Ariz. 1998). However, each of those cases involved conduct so egregious that the failure to stop the alleged violations and to preserve the status quo, pending a full hearing on the merits, would render an ultimate Board decision and remedial action meaningless. As discussed below, that is not the case here.

Notably, the General Counsel rarely seeks, and the courts rarely enter, an injunction requiring reinstatement of discharged employees who do not either belong to a certified union, or who are not trying to organize a union. This is because "[w]hen filing a petition for injunctive relief pursuant to section 10(j), the Board acts not in the interests of the individual employees affected by the employer's actions but rather in the public's interest as embodied in the [Act]." *NLRB v. Lenape Products, Inc.*, 781 F. 2d 99, 1004 (3rd Cir. 1989). Where employees have no intent to seek unionization, Section 10(j) relief is not warranted because "the public interest in safeguarding the collective bargaining process, both in its formative stages and subsequently, is not at stake . . . ." *See id.* at 1005. (upholding denial of 10(j) petition seeking reinstatement of nine nonunion employees who walked off the job in protest of working conditions). Similar to *Lenape*, the discharged associates at issue here do not belong to a certified bargaining unit, and they expressly (and repeatedly) disavow any intent to organize Walmart associates. Thus, the public interest at issue here is preserving employers' ability to control their own daily work schedules without intermittent, union-orchestrated staffing and demonstration disruptions, not the individual interest of certain associates who want to work on their own schedule.

2. The Charge Does Not Meet The Equitable Criteria For Section 10(j) Relief.

When presented with a Section 10(j) petition, a district court considers whether there is "reasonable cause to believe" that a respondent has violated the Act and whether temporary injunctive relief is "just and proper." 29 U.S.C. § 160(j); *see also Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185 (5th Cir. 1975). In determining whether there is reasonable cause to believe that an employer has violated the Act, the district court must not decide the merits of the case, but rather is limited to determining whether the Regional Director's "theories of law and fact are not insubstantial and frivolous." Id. at 1189, 1191. Additionally, in contrast to the

deference accorded to NLRB determinations by the courts of appeals, nothing in the Act requires district courts to defer to the Board's 10(j) requests. *Id.* at 1193. Instead, the Act requires district courts to exercise its own judgment rather than simply sign off on Board requests. *Id.*

Here, the UFCW's broad-brush allegations splinter into many different scenarios on careful examination. For example, many (16) of the alleged discriminates suffered no adverse employment action at all. Many others (9), never gave Walmart *any* advance notice of any labor-related absence, and all but one gave no notice for more than a one day's absence. And none of them *went on strike*! Rather they joined a cross-country bus caravan to attend union meetings, pose for media-ops, and go to a Walmart shareholders meeting. None of that sounds like a case in which a district court would see an obvious Act violation (given the substantial weight of relevant Board law) or a pressing public interest in need of extraordinary court intervention.

In any event, even if the Regional Director could establish the "reasonable cause" element, the Regional Director cannot satisfy the "just and proper" requirement as it relates to granting injunctive relief in a case involving disciplined/discharged employees (or alleged threats). As the Fifth Circuit has stated, "[r]einstatement of unlawfully discharged employees is 'generally left to the administrative expertise of the Board.'" *Overstreet v. El Paso Elec. Co.*, 176 Fed.Appx. 607, 609-11 (5th Cir. 2006), *quoting Pilot Freight*, 515 F.2d at 1192. (finding no abuse of discretion when district court denied injunctive relief where it was unconvinced that reinstatement would alter employee participation in union proceedings or that the union did not have a hand in its own ineffectiveness); *see also Davis v. Acker Indus., Inc.*, 312 F.Supp. 1400, 1405-06 (D.C. Okl. 1970) (where no evidence of threats to employees, no injunction should issue). Moreover, the Regional Director cannot show an injunction is necessary based on speculation that discharged employees may "scatter" before the Board hears the case. *See Schaub v. Detroit Newspaper Agency*, 154 F. 3d 276, 280 (6th Cir. 1998) ("Speculation as to the extent and pace of further scattering did not impress the district court as being a sound reason for concluding the Board's remedial powers would be frustrated unless an injunction were issued").

Additionally, the UFCW cannot claim that this is some kind of "nip in the bud" case. The UFCW has been pursuing its messaging agenda through its OURWalmart subsidiary for years, and the UFCW and OURWalmart loudly and repeatedly state (per their settlement agreement with the NLRB) that they have no desire to represent Walmart associates. And there is little or no connection – other than one bus ride together – between the individual JWO Associates, who are spread out across the country at different stores. Accordingly, a district court would likely find that an injunction would do nothing to preserve the Board's remedial authority or "group dynamic" in a store-level organizing environment. Accordingly, 10(j) relief is not appropriate or applicable in this case. *See Parents In Community Action, Inc.*, 172 F.3d at 1040 (no abuse of discretion to deny injunction to require reinstatement of terminated union activist where there was no recognized or certified union, no showing of strong union support, and only one activist was discharged); *Eisenberg v. Lenape Prods, Inc.*, 781 F.2d 999, 1004-05 (3d Cir. 1986) (injunctive relief not necessary to prevent harm to employee's right to engage in protected activity pending any delayed final relief such as reinstatement); *Acker Indus., Inc.*, 312 F.Supp. at 1405-06 (same).

III. CONCLUSION.

For the foregoing reasons, Walmart did not violate the Act as alleged, and the Company respectfully requests that the Region dismiss the Charges absent withdrawal. Please contact us with any questions or if you require additional information.[3]

Kind regards,

Steven D. Wheeless
Alan Bayless Feldman

[3] Walmart submits the information in this letter for the sole purpose of resolving OURWalmart's Charge. Walmart specifically reserves all rights and defenses (including procedural, *Noel Canning*, and Vacancy Act issues) that it now has or may later possess concerning the Charge or related issues. Walmart further requests that the NLRB keep all information related to OUR Walmart's Charge confidential to the fullest extent permitted by law.

(b) (6), (b) (7)(C)

TAB 23

Steven D. Wheeless
602 257 5234
swheeless@steptoe.com

Alan Bayless Feldman
602 257 5254
afeldman@steptoe.com

201 East Washington Street
Suite 1600
Phoenix, AZ 85004-2382
602 257 5200 main
602 257 5299 fax
www.steptoe.com

Steptoe
STEPTOE & JOHNSON LLP

October 23, 2013

VIA FACSIMILE (817-978-2928), E-FILE, FEDERAL EXPRESS

David A. Foley, Field Attorney
National Labor Relations Board, Region 16
819 Taylor Street, Room 8A24
Fort Worth, TX 76102-6178

RE: WALMART: Charge No. 16-CA-113087

Dear David:

Walmart Stores, Inc. appreciates the opportunity to respond to the United Food and Commercial Workers' September 9, 2013 "companion" Charge, as filed by its wholly-owned "OURWalmart" subsidiary, and supplemented by your September 23 email. In its companion Charge, the UFCW raises the same narrow question of whether Walmart can apply its attendance policy to unexcused absences of ten additional associates not previously identified in the UFCW's Charge 16-CA-108394, who also participated in the same UFCW-coordinated series of hit-and-run "strikes" designed to pressure Walmart into "raising the bar for jobs throughout the entirety of [the UFCW's] industries." To avoid unnecessary repetition, Walmart incorporates here its September 3 response and September 10 supplemental response to the UFCW's previous Charge 16-CA-108394, as though set forth in full. The UFCW's companion Charge fails for the same reasons stated in those prior position statements, and thus, the Charge further does not warrant § 10(j) consideration.[1]

In addition, we attach a recent "Why Walmart?" strategy statement by a key UFCW affiliate on its Making Change at Walmart campaign team, Jobs with Justice ("JwJ") [Tab 1.] That policy statement expressly refers to the Campaign's IWS tactics in the context of the overall strategy to "raise[] the floor for working people." [*Id.*] The UFCW and JwJ serve as each other's agents in their collaborative Walmart-targeted campaign efforts, including their planning and execution of intermittent work stoppages. [Deposition Transcripts of (b) (6), (b) (7)(C) 58:11-21, 59:16-60:3, 79:7-80:16, 111:9-21, 133:18-134:6, 139:20-140:2; (b) (6), (b) (7)(C) 65:17-21, 68:22-69:2, 73:14-21, 97:20-24; (b) (6), (b) (7)(C) 66:13-22, 84:5-9, 115:16-117:24,

[1] Walmart incorporates additional factual evidence and legal analysis from this response as thought set forth in full to further support its responses to Charge 16-CA-108394.

162:16-163:6, 183:16-23; (b) (6), (b) (7)(C) 100:19-101:5 at Tab 2.] Along with additional dispositive evidence provided below, that "Why Walmart?" Strategy document serves as further conclusive evidence that the UFCW and its agent/allies conduct the IWS at issue in this Charge and Charge 16-CA-108394 (as well as other Charges) as part of an overarching union-coordinated campaign: A years-long campaign that repeatedly calls for the same generic claims for "more money, better benefits, guaranteed hours, and no retaliation."

And the UFCW has made it abundantly clear that it intends to continue using such IWS to further its long-term "raise the bar" campaign. During the UFCW-orchestrated June 2013 "Ride for Respect" at issue in this Charge and the UFCW's recently coordinated nationwide demonstrations on September 5, 2013 (as described in Walmart's previous supplemental response), the UFCW expressly confirmed its intent to plan, coordinate, and conduct IWS again during Walmart's upcoming Black Friday events to further its "raise the bar" campaign, demanding "an end to retaliation against those who bravely speak out *and a real wage of $25,000/yr.*" [Tab 3 (emphasis added).] On the UFCW's Making Change at Walmart website immediately after its nationwide demonstrations, the UFCW boasted: "In largest mobilization since Black Friday, 100 Arrested In Eleven Cities *Protesting Walmart's Illegal Retaliation, Low Wages*" and then "announced widespread, massive strikes and protests for Black Friday in 2013." [Tab 4 (emphasis added).] OURWalmart member (b) (6), (b) (7)(C) – one of the ten associates identified in this Charge – further publicly warned: "Look out for Black Friday." [Tab 5.] The UFCW's IWS threats – several months in advance of Black Friday – cannot (and does not) relate to any discrete, local issue – key indicia of a protected strike – and thus, does not constitute protected activity. As posed before, the question remains: Who controls the work schedule in America: The employer or the Union?

I. FACTUAL BACKGROUND.

A. Walmart Uniformly Applied Its Attendance Policy To The Additional Ten June Walkout Associates As It Did To Similarly-Situated Associates.

As Walmart described in its previous September 3 response, numerous Walmart associates participated in the UFCW's June walk-off ("JWO") activity known as the Ride for Respect, including the previously discussed 51 JWO Associates and the 10 JWO Associates at issue in this Charge. The vast majority submitted the same UFCW-drafted strike and return-to-work letters, as did most of the 10 JWO Associates. [Tabs 6-15; *see also* Walmart's September 3 response at Tabs 6, 9, 10, 11.] As before, those same generic letters only informed management that the JWO Associates intended to strike for one day: "*Today*, we the Associates whose signatures appear below, will not be working." [*Id.*] Additionally, many of those JWO Associates did not provide the initial strike letter to their management until several days after they had already failed to report to work for several of their scheduled shifts. [*Id.*] As described below, approximately 3 of the 10 JWO Associates participated in the UFCW-orchestrated hit-and-run IWS campaign on (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) , and (b) (6), (b) (7)(C) 2012. Those JWO Associates – along with the other JWO Associates – participated in yet another round of IWS in (b) (6), (b) (7)(C), 2013. The UFCW's generic IWS campaign letters did not change from (b) (6), (b) (7)(C) 2012 to (b) (6), (b) (7)(C) 2013. [*Id.*] As previously detailed, they

contain no specifics and no details; just the same generic, recurrent demand for better working conditions, the generic protest over purported, unspecified retaliation, and the same generic claim to be engaged in a ULP strike (clearly scripted by the UFCW to try to avoid the economic-striker replacement scenario).

As before, Walmart again shows on a store-by-store basis that store management applied the Company's Attendance/Punctuality and Coaching for Improvement Policies to the 10 JWO Associates for their (1) failure to work scheduled shifts while participating in the UFCW's Ride for Respect IWS and education/media events, and (2) where appropriate, for their failure to report absences as required by the same Policy. Notably, *most* of the 10 JWO Associates did not receive any discipline under the Attendance Policy at all based on the status of their attendance and prior-disciplinary history. In those cases, management merely reminded them of the Company's Attendance/Punctuality Policy. In all cases where management issued discipline or discharge to JWO associates, they read from pre-prepared Talking Points, which they read verbatim to the associates. [*See* Walmart's September 3 response at Tab 43.][2]

Moreover, as previously shown with the prior 51 JWO Associates, store management at the stores where the 10 JWO Associates work or worked applied the Attendance/Punctuality Policy to other similarly-situated associates. In fact, as an update to the Company's previous September 3 response (to take into account the three additional stores that the UFCW did not previously identify), in the last two years from July 1, 2011 to July 1, 2013, management at those stores issued approximately 7,200 coachings to associates for violating the Attendance/Punctuality Policy. [Tab 16; *see also* Walmart's September 3 response at Tab 41.] In particular, during that two year period, management at those stores issued approximately 3,227 First Written Coachings, 2,424 Second Written Coachings, and 1,549 Third Written Coachings. [*Id.*] In addition, during that same period, store management discharged over 3,100 associates for attendance-related violations. [Tab 17; *see also* Walmart's September 3 response at Tab 42.]

1. Richmond, California – Store 3455.

(b) (6), (b) (7)(C) faxed the same generic UFCW-supplied "walk out" letter to management dated (b) (6), (b) (7)(C). [Tab 6.] At the time (b) (6), (b called out, (b) (6), (b) (7)(C had a Third Written Coaching in (b) (6), (b file. [*Id.*] (b) (6), (b) (7)(C worked a part-time schedule of overnight shifts, generally just two days per week. (b) (6), (b) (7)(C called the IVR system on (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) citing (b) (6), (b) (7)(C) and on (b) (6), (b) (7)(C) in which (b) (6), (b provided no reason. [*Id.*] (b) (6), (b) (7)(C failed to work (b) (6), (b scheduled shifts on (b) (6), (b) (7)(C)

[2] The UFCW's companion Charge duplicates allegations from its previous Charge 16-CA-108394 for two JWO Associates – (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) The Region acknowledged the inadvertent duplication, and you told us that Walmart did not need to respond again as to (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) Walmart refers the Region to its response to the previous Charge for facts and argument specific to (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C)

[redacted] and [redacted] did not call the IVR for [redacted] shift). [*Id.*] [redacted] provided management the generic UFCW-supplied "return-to-work" letter dated [redacted] [*Id.*] However, before management could issue [redacted] the next level of discipline (a discharge) [redacted] continued to call in and failed to work [redacted] scheduled shifts on [redacted] and [redacted] and [redacted] [*Id.*] [redacted] called the IVR citing [redacted] for all of the scheduled shifts except for [redacted] and [redacted] which [redacted] provided no reason for failing to work those shifts. Consequently, based on [redacted] coaching level and [redacted] multiple unexcused absences, store management discharged [redacted] for attendance on [redacted]. [*Id.*] Notably, [redacted] signed the same generic UFCW-supplied "walk out" and "return-to-work" letters on [redacted] and [redacted] 2012, but [redacted] was not scheduled to work on those days. [*Id.*]

In the past two years, store management has issued 93 coachings and discharged 58 associates for attendance-related violations at that store. [*See* Walmart's September 3 response at Tabs 41, 42.]

2. San Leandro, California – Store 5434.

[redacted] faxed a generic UFCW-supplied "walk out" letter to management dated [redacted] [redacted] failed to work [redacted] scheduled shifts on [redacted] and [redacted] [Tab 7.] [redacted] did not call the IVR system to report any of those unexcused absences. [redacted] delivered a generic UFCW-supplied "return-to-work" letter to management dated [redacted] [*Id.*] At the time [redacted] returned to work, [redacted] already had a Third Written Coaching for attendance and performance. [*Id.*] Consequently, based on [redacted] coaching level at the time and [redacted] multiple unexcused absences, management discharged [redacted] [*Id.*] Notably, [redacted] engaged in multiple earlier UFCW-orchestrated IWS in which [redacted] failed to work [redacted] scheduled shifts on [redacted], 2012 and [redacted], 22 and [redacted] 2012. [*Id.*] [redacted] provided the same generic walk out letters on [redacted] 2012 and [redacted], 2012, as well as the same generic return-to-work letter on [redacted], 2012 and [redacted], 2012. [*Id.*]

In the past two years, store management has issued 193 coachings and discharged 146 associates for attendance-related violations at that store. [*See* Walmart's September 3 response at Tabs 41, 42.]

3. Aurora, Colorado – Store 5334.

[redacted] called store management and gave verbal notice of [redacted] intent to "strike" on [redacted] did not provide the generic UFCW-supplied "walk out" letter. [redacted] failed to work [redacted] scheduled shifts on [redacted] and [redacted] [Tab 8.] At the time [redacted] left work, [redacted] had a First Written Warning on file. [*Id.*] [redacted] returned to work on [redacted] at which time [redacted] submitted the generic UFCW-supplied "return-to-work" letter. [*Id.*] Although [redacted] unexcused absences warranted the next level of discipline, management determined that it had not consistently applied the attendance policy at the store during the prior few months. Consequently, management did not discipline [redacted] at all. Management simply reminded [redacted] about the Attendance Policy.

In the past two years, store management has issued 236 coachings and discharged 173 associates for attendance-related violations at the store. [*See* Walmart's September 3 response at Tabs 41, 42.]

4. Denver, Colorado – Store 3533.

(b) (6), (b) (7)(C) gave store management verbal notice of [redacted] intent to "strike" on [redacted] near the end of [redacted] shift. [redacted] did not provide the generic UFCW-supplied "walk out" letter. [redacted] failed to work [redacted] scheduled shifts on [redacted] (failed to work complete shift), [redacted] and [redacted] [Tab 9.] At the time [redacted] left work, [redacted] already had a Third Written Coaching in [redacted] file for job performance ([redacted] had other coachings for attendance). [*Id.*] [redacted] returned to work on [redacted] at which time [redacted] submitted the generic UFCW-supplied "return-to-work" letter. [*Id.*] Although [redacted] unexcused absences warranted the next level of discipline, management determined that it had not consistently applied the attendance policy at the store during the prior few months. Consequently, management did not discipline [redacted] at all.

In the past two years, store management has issued 284 coachings and discharged 113 associates for attendance-related violations at the store. [Tabs 16, 17.]

5. Chicago, Illinois – Store 5781.

(b) (6), (b) (7)(C) signed an undated petition protesting working conditions on or about [redacted] but it did not say anything about not working or a "strike." [Tab 10.] [redacted] did not provide the generic UFCW-supplied "walk out" letter. [redacted] failed to work [redacted] scheduled shifts on (b) (6), (b) (7)(C) and [redacted] [*Id.*] [redacted] called the IVR system on [redacted] to note that [redacted] would not work [redacted] scheduled shift on [redacted] but provided no reason for the unexcused absence. [*Id.*] At the time [redacted] called out for that one day, [redacted] had a Second Written Coaching on file for poor productivity. [*Id.*] [redacted] returned to work on [redacted] at which time [redacted] submitted the generic UFCW-supplied "return-to-work" letter. [*Id.*] Although [redacted] unexcused absences warranted the next level of discipline, [redacted] did not have any active coachings for attendance issues and no prior personal discussion on file. Consequently, store management did not discipline [redacted] but decided to give [redacted] a verbal personal discussion instead. [*Id.*] Store management has issued personal discussions to other similarly-situated associates. [*See* Walmart's September 3 response at Tab 48.]

In the past two years, store management has issued 594 coachings and discharged 242 associates for attendance-related violations at that store. [*See* Walmart's September 3 response at Tabs 41, 42.]

6. Baker, Louisiana – Store 1102.

(b) (6), (b) (7)(C) gave store management the generic UFCW-supplied "walk out" letter dated [redacted]. [Tab 11.] [redacted] also called the IVR system on [redacted] to report that [redacted] would not work [redacted] June 1 shift, but provided no reason for her unexcused absence. [*Id.*] [redacted] failed to work [redacted] assigned shifts on (b) (6), (b) (7)(C) and [redacted] [*Id.*] [redacted] returned to work on [redacted] at which time [redacted] provided management with the generic UFCW-supplied "return-to-work" letter. [*Id.*] At the time [redacted] walked out, [redacted] had a Second Written Coaching on file. [*Id.*]

Consequently, based on [redacted] coaching level at the time and [redacted] multiple unexcused absences, management issued [redacted] a Third Written Warning for attendance. [*Id.*]

[redacted] gave store management the generic UFCW-supplied "walk out" letter dated [redacted]. [Tab 12.] [redacted] called the IVR on [redacted] to note that [redacted] would not work [redacted] scheduled shift on [redacted] but gave no reason for the unexcused absence. [*Id.*] [redacted] failed to work [redacted] scheduled shifts on [redacted] and [redacted] [*Id.*] [redacted] returned to work on [redacted] [*Id.*] [redacted] provided management with the generic UFCW-supplied "return-to-work" letter. [*Id.*] [redacted] already had a First Written Coaching in [redacted] file for job performance. [*Id.*] However, before management could issue [redacted] the next level of discipline for [redacted] unexcused absences, [redacted] voluntarily quit. On [redacted] walked off the job stating there was "too much work" and then left the building. [*Id.*] Notably, [redacted] signed the same generic UFCW-supplied "walk out" and "return-to-work" letters on [redacted] 2012, but [redacted] worked [redacted] scheduled shift on that day. [*Id.*]

In the past two years, store management has issued 368 coachings and discharged 182 associates for attendance-related violations at that store. [*See* Walmart's September 3 response at Tabs 41, 42.]

7. Cincinnati, Ohio – Store 4609.

[redacted] gave store management the generic UFCW-supplied "walk out" letter on [redacted] [Tab 13.] [redacted] called the IVR system on [redacted] to report that [redacted] would not work [redacted] scheduled shift on [redacted]. [*Id.*] [redacted] gave the reason as "illness/injury." [*Id.*] [redacted] failed to work his scheduled shifts on [redacted] and [redacted] [*Id.*] [redacted] returned to work on [redacted] at which time [redacted] provided management with the generic UFCW-supplied "return-to-work" letter (dated [redacted] [*Id.*] At the time [redacted] missed work, [redacted] had a First Written Coaching on file for attendance. [*Id.*] Although [redacted] unexcused absences warranted the next level of discipline, management determined that it had not consistently applied the attendance policy at the store during the prior few months. Consequently, management did not discipline [redacted] at all.

In the past two years, store management has issued 139 coachings and discharged 89 associates for attendance-related violations at that store. [Tabs 16, 17.]

8. Mt. Vernon, Washington – Store 2596.

[redacted] gave store management the generic UFCW-supplied "walk out" letter dated [redacted] [Tab 14.] [redacted] also called the IVR system to report that [redacted] would not work [redacted] scheduled shift on [redacted] but [redacted] provided no reason for the unexcused absence. [*Id.*] [redacted] failed to work [redacted] scheduled shifts on [redacted], and [redacted] [*Id.*] [redacted] returned to work on [redacted], at which time [redacted] provided management with the generic UFCW-supplied "return-to-work" letter. [*Id.*] At the time [redacted] left work, [redacted] had a First Written Warning on file for poor customer service. [*Id.*] Although [redacted] unexcused absences warranted the next level of discipline, management determined that [redacted] had no prior attendance problems, only a few unexcused absences within a week period, and no personal discussion on file. Consequently, store management did not discipline [redacted] at all. Management simply reminded [redacted] about the attendance policy as part of a personal discussion. [*Id.*] Store management has issued personal

discussions to other similarly-situated associates. [*See* Walmart's September 3 response at Tab 48.]

In the past two years, store management has issued 183 coachings and discharged 64 associates for attendance-related violations at that store. [*See* Walmart's September 3 response at Tabs 41, 42.]

9. Port Angeles, Washington – Store 2196.

(b) (6), (b) (7)(C) gave the store the generic UFCW-supplied "walk out" letter on [redacted] [Tab 15.] [redacted] also called the IVR for [redacted] unexcused absence on [redacted] but provided no reason for the absence. [*Id.*] [redacted] failed to work [redacted] scheduled shifts on M(b) (6), (b) (7)(C) [redacted], and [redacted] [*Id.*] [redacted] returned to work on [redacted] at which time [redacted] provided management with the generic UFCW-supplied "return-to-work" letter (dated [redacted] [*Id.*] [redacted] had no discipline on file at the time [redacted] went out. Although [redacted] had received an earlier personal discussion for attendance, upon investigation, store management determined that [redacted] earlier absences, which prompted the personal discussion, should have been recorded as excused. Although [redacted] unexcused absences warranted the next level of discipline, management determined that [redacted] had no prior attendance problems, only a few unexcused absences within a week period, and no active personal discussion on file. Consequently, store management did not discipline [redacted] at all. Management simply reminded [redacted] about the Attendance Policy. Notably, [redacted] engaged in previous UFCW-coordinated IWS on [redacted], 2012 and [redacted], 2012. [redacted] did not provide any "walk out" or "return-to-work" letters during those IWS.

In the past two years, store management has issued 88 coachings and discharged 36 associates for attendance-related violations at that store. [Tabs 16, 17.]

B. The UFCW Continues To Plan, Coordinate, And Conduct, More IWS As Part Of Its Overarching Long-Term "Raise The Bar" Campaign.

1. Jobs with Justice "Partners" With The UFCW To Plan And Execute The UFCW's "Raise the Bar" Campaign, Including Through IWS.

As discussed above, the JwJ's recent "Why Walmart?" strategy statement serves as dispositive evidence that JwJ collaborates with the UFCW in furtherance of the UFCW's overarching long-term "raise the bar" campaign, including IWS to further that campaign.

As discussed in its September 10 supplemental response to Charge 16-CA-108394, Walmart described the UFCW's coordinated "raise the bar" nationwide demonstrations on September 5 (Labor Day). During those demonstrations, the UFCW and JwJ collaborated to demand the same "better wages, more hours, and no retaliation," which the UFCW has continually called for as far back as the UFCW-coordinated National Day of Action IWS in October 2012 and Black Friday IWS in November 2012. [Labor Day Demonstration Chart at Tab 18.] An *In These Times* article captured the essence of the UFCW and JwJ collaboration to promote the UFCW's "core" "raise the bar" message through its coordinated IWS "strikes" (as well as to "organize" Walmart's associates):

> Late last week, OUR Walmart – a union-backed organization of store associates *calling for improved working conditions, health benefits, and a minimum of $13-an-hour wage*—staged its largest protests since Black Friday. Demonstrators in 15 cities drew several thousand people, and about 100 were arrested. In addition to OUR Walmart's core demands, the protestors turned out to insist that Wal-Mart rescind the verbal and written warnings issued to some 60 OUR Walmart members who were part of a prolonged strike this June and reinstate 20 strikers who were fired.
>
> . . .
>
> Nationally, ***Jobs with Justice (JwJ) partners with the UFCW on campaigns around Wal-Mart.*** These include efforts to force concessions from the company before it moves into a new city . . . .
>
> While the UFCW provides OUR Walmart with organizing support, JwJ carries out an important, but sometimes overlooked, role in the effort to organize low-wage workers – that of building broad-based community support.
>
> 'Some of the traditional forms of union organizing have been under attack for so long, have been eroded for decades to the extent that workers are having to depend on more community-based strategies,' says (b) (6), (b) (7)(C) [redacted] This is particularly crucial for the unconventional model of "non-majority" or "minority unionism" exhibited by OUR Walmart and the fast-food worker campaigns, which differs from more traditional forms of organizing that aim to win official representation for collective bargaining through elections overseen by the National Labor Relations Board.
>
> (b) (6), (b) (7)(C) says (b) (6), prefers to call this community-backed model organizing 'Section 7 organizing,' referencing Section 7 of the National Labor Relations Act, which guarantees workers – regardless of whether they're represented by a recognized union – the right to engage in 'concerted activities' for 'mutual aid or protection.'
>
> 'Minority unionism,' 'non-representational bargaining,' and 'non-majority unionism' – phrases like that are all about the lack of collective bargaining. . . Don't use a term that says you're stopping short of something. You're not stopping short of anything,' Weissman argues. 'What the OUR Walmart campaign is doing, it's asserting [workers'] rights under Section 7.'

[Tab 19 (emphasis added).]

During the September 5 UFCW-coordinated demonstrations, the UFCW and JwJ demonstrators carried signs demanding better pay, more hours, and no retaliation, and chanted similar demands in "call-and-response" fashion. [Tab 20.]

In a September 6, 2013 article in The Nation immediately after the UFCW-coordinated nationwide demonstrations, Josh Eidelson reported about the UFCW's continued overarching

"raise the bar" campaign in the form of the nationwide demonstrations: "Along with reinstatement of fired workers, yesterday's demonstrations also demanded the company offer an annual wage of at least $25,000 . . . ." [Tab 21.] Eidelson provided additional warnings that the UFCW's "raise the bar" campaign would continue. He stated: "In an e-mailed statement, a campaign closely tied to the United Food & Commercial Workers union promised 'widespread, massive strikes and protests for Black Friday,' the day after Thanksgiving." [*Id.*]

2. In Early October, The UFCW's "Raise The Bar" Campaign Continued With Planned "Sit Down" Demonstrations At Walmart.

Along with the JwJ, the UFCW also affiliates with the AFL-CIO to further its "raise the bar" campaign. [Tab 22.] On the heels of the UFCW-coordinated Ride for Respect and Labor Day mass demonstrations, in early October the AFL-CIO planned and coordinated a "Mobilization Meeting" to conduct similar demonstrations to: "Stand up against ***income inequality*** by sitting down at Walmart." [*Id.* (emphasis added)] As part of its promotion of the planned demonstrations, the AFL-CIO published a flyer with a photograph of Rosa Parks with the caption: "She sat down and changed the course of history." [*Id.*] The flyer further encouraged supporters: "You can be part of the Largest Non-Violent Walmart civil disobedience in history!" [*Id.*] The flyer identifies no discrete, local employment issues, but instead further advances the UFCW's continuing "raise the bar" campaign message of income inequality. [*Id.*]

3. The UFCW Confirmed In Declarations Its "Raise The Bar" Campaign Seeking The Same Generic Changes At Walmart.

On October 17, 19, and 21, 2013, (b) (6), (b) (7)(C) [redacted], and (b) (6), (b) (7)(C) [redacted] all provided declarations in opposition to Walmart's motion for a preliminary injunction in its trespass lawsuit against the UFCW, OURWalmart (and others) in California. In their declarations, the UFCW representatives unequivocally confirmed the UFCW's "raise the bar" campaign in which they have previous demanded and continue to demand the same generic "more money, better benefits, guaranteed hours, and no retaliation" changes at Walmart *including during IWS demonstrations in California*. [Tab 23.] Specifically, each UFCW representative stated:

> I have helped to coordinate most of the efforts by OUR Walmart and other groups seeking to pressure Walmart into making changes in some of its employment and other practices. Among other things, I helped coordinate and often participated in most of the events alleged in the complaint that occurred in Southern California [or Northern California].
>
> Among the changes which OUR Walmart seeks with the UFCW's full support are:
>
> a. "Respect" for its own employees by, among other things, respecting the fact that they might actually like spending Thanksgiving with their families (instead of making a few extra millions for the billionaire Walton family by having to come to work that evening);

b. A public commitment by Walmart to pay its employees at least $25,000 per year;

c. The creation of more full-time positions and otherwise increasing hours for employees; and

d. The reinstatement of employees who have been discharged or otherwise disciplined, primarily for exercising their rights under the National Labor Relations Act.

[*Id.*] The UFCW representatives further emphasized the UFCW's "raise the bar" campaign's objective, none of which included any discrete, local employment issues – key indicia of protected strikes. The three UFCW representatives added: "Each of the events I helped to coordinate was designed to bring attention to and obtain public support for one or more of the changes [see above] being sought at Walmart." [*Id.*]

4. The UFCW Promises More IWS "Strikes" On Black Friday In Furtherance Of Its Long-Standing "Raise The Bar" Campaign.

As it did prior to Black Friday last year, the UFCW again calls for Walmart associates to walk off the job to participate in IWS demonstrations at Walmart facilities across the country during Black Friday events in 2013 to further its long-term "raise the bar" campaign. An October 2012 email from the (b) (6), (b) (7)(C) about a draft press release indisputably demonstrates the UFCW's long-standing agenda.

The 2012 press release emphasized: "Walmart Faces First-Ever Strikes in a Dozen Cities" and "Workers, Community Leaders Commit to Reclaiming Black Friday for Walmart Workers." [Tab 24.] It goes on to call on Walmart to stop "retaliation" and claims "problems with poverty paychecks that are the result of low wages and inconsistent hours and scheduling." [*Id.*] In its email, (b) (6), (b) (7)(C) notes that they "NEED a worker to sign off on quote in release." [*Id.* (emphasis in original)] The proposed quote stated:

> Walmart's efforts to try to silence us is only building support among our co-workers in calling for changes at the store. We will not be silenced, especially on Black Friday when Walmart wants us to cut short the holiday with our families to help the company profit. If Walmart wants workers fully committed to the stores on Black Friday, Walmart needs to do more for us the rest of the days of the year. [*Id.*]

Clearly, no discrete, local issues existed if the UFCW, through its agents, drafted its propaganda *before* even talking with a Walmart associate. A review of the entire draft press release shows that it does not identify any discrete, local issues, but instead contains the same generic "raise the bar" message that the UFCW continued to use and presently uses in its campaign against Walmart. [*Id.*]

More recently, the UFCW (and its affiliates) have inundated the Internet with numerous websites and posts seeking public support for the UFCW's planned IWS "strikes" during

Walmart's upcoming 2013 Black Friday events. For example, as it did in 2012, the UFCW has posted on its Making Change at Walmart website a petition pledging to "make Black Friday 2013 a day to remember." [Tab 25.] In its petition, the UFCW continues to attempt to pressure Walmart into "raising the bar" for jobs throughout the entirety of the UFCW's industries. Specifically, the petition states:

> The company and our country are at a critical crossroads. As many of the new jobs created by the recovery are low-wage, retail jobs, it is essential to the future of the middle class that we make sure the country's largest retailer is providing decent jobs that allow a family to live above the poverty line. Walmart workers are leading this movement for change and they need our support.

[*Id.*] In referencing its previous September 5 nationwide demonstrations in the petition, the UFCW adds: that thousands of community supporters and workers continue[] to mobilize for Walmart to publicly commit to a real wage of at least $25,000 annually . . . ." [*Id.*]

On another affiliate website, the UFCW further provides store locations where it intends to conduct IWS "strikes" and states: "Join Walmart workers around the country on Black Friday (Nov. 29th), the biggest shopping day of the year as they stand up to Walmart and *call for an end to retaliation against those who bravely speak out and a real wage of $25,000/yr.*" [Tab 3 (emphasis added); Tab 25.]

The same website, provides talking points encouraging the public to "find an action near you, or lead your own." [Tab 26.] Again, the UFCW continues to promote its "raising the bar" campaign through those talking points that state:

> This Black Friday, Walmart workers, customers and community members will stand together in protest and demand that the Walmart and the Walton family start paying workers $25,000 a year. By challenging Walmart, protestors are telling every US employer that Walmart jobs are not good enough for America.
>
> The situation facing Americans is dire and millions are hurting. That's why Walmart workers joined by community supporters are going to protests on Black Friday. Thousands across the country will protest and risk arrest to show they are committed to better wages and to a better tomorrow that ensures freedom of speech without fear of retaliation for themselves and their children.
>
> On November 29th, Walmart and the country will see low-wage retail workers and their supporters stand-up and take action in mass like never before. And an unequivocal message will be sent; we are standing up because the Walmart economy has so negatively impacted our communities and our livelihood that silence is not an option and inaction is not a choice. [*Id.*]

Yet, through another Making Change at Walmart website, the UFCW further seeks supporters to join the "Black Friday Walmart Protest" and again promotes its "raising the bar" campaign by stating: "Walmart grosses over 400 billion dollars annually – Why are the workers making poverty wages?" The UFCW then asks: "Will you stand with Walmart workers this Black Friday?" [Tab 27.]

A "Wal Mart Black Friday Strike" facebook page advocating that associates strike on Black Friday notes: "We are in Solidarity with all that have to struggle with low wages. Everyone deserves a living wage with healthcare!" [Tab 28.] Another post threatens the same type of IWS actions the UFCW coordinated on Black Friday in 2012: That post states "Walmart workers say that if Walmart doesn't end its attempts to silence workers, they will make Black Friday a very memorable day for the company – complete with actions inside and outside the stores . . . ." [*Id.*]

Those posts (and others like them) have one thing in common – they all fail to identify a discrete, local issue as required to potentially protect a strike. Rather, those posts simply continue the UFCW's "raise the bar" campaign by making the same generic "better wages, more hours, and no retaliation" claims that the UFCW has made over the last few years. The UFCW's plan to coordinate IWS strikes in support of those "raise the bar" claims simply does not receive the Act's protection.

II. LEGAL ANALYSIS.

As stated above, Walmart incorporates here by reference its September 3 response and September 10 supplemental response to Charge 16-CA-108394 as set forth in full. In addition to the voluminous facts Walmart presented in those position statements, its corresponding legal analysis demonstrates that, as with the 51 JWO Associates, the 10 JWO Associates in this Charge similarly did not engage in any protected activity when they failed to work their scheduled shifts to participate in the UFCW-coordinated IWS and educational/media events during the Ride for Respect. *See e.g., National Steel and Shipbuiding Co.*, 324 NLRB 499, 499, 505 nn. 13, 15, 526-27 (1997); *Merillat Industries, Inc.*, 307 NLRB 1301, 1305 (1992). The overwhelming evidence demonstrates that the UFCW planned and coordinated the unprotected IWS during the Ride for Respect as part of its long-term "raise the bar" campaign (involving no discrete issues), which it intends to continue into the future – next stop, Black Friday. *See Care Center of Kansas City*, 350 NLRB 64, 67-68 (2007).

Moreover, the 10 JWO Associates also engaged in unprotected activity when they failed to notify their store management as required under the Company's Attendance/Punctuality Policy that they would not show up for work beyond the one-day generic "strike" notice that several provided to store management. All 10 JWO Associates failed to work multiple scheduled shifts. *See Bird Engineering*, 270 NLRB 1415, 1415 (1984). Accordingly, Walmart lawfully applied its attendance policy to the JWO Associates, in particular (b) (6), (b) (7)(C), and (b) (6), (b) (7)(C) who all received some form of discipline based on their current discipline level and confirmation that their store management applied the attendance policy consistently. Walmart did not discipline JWO Associates, (b) (6), (b) (7)(C), and (b) (6), (b) (7)(C) because no discipline was warranted under the Policy or their store management teams could not

demonstrate adequate consistency in enforcement. Accordingly, none of those JWO Associates suffered any cognizable adverse employment action. *See e.g., Lancaster Fairfield Comm. Hosp.*, 311 NLRB 401, 403 (1993). Nor did Walmart discipline Castle, who voluntarily quit before receiving any discipline and also did not suffer any adverse employment action. Walmart applied its attendance policy to the 10 JWO Associates in a non-discriminatory manner. *See e.g., Avondale Industries*, 329 NLRB 1064, 1066 (1999); *Reliable Maintenance*, Advice Memorandum, 2006 WL 5054728, *3 (Case No. 18-CA-18119, October 31, 2009).[3]

III. WALMART'S RESPONSES TO THE REGION'S ADDITIONAL DISCOVERY REQUESTS.

As part of Walmart's previous September 3 response to Charge 16-CA-108934, it went to extraordinary lengths to provide the Region exhaustive factual information and legal analysis of the two, relatively straightforward issues raised by the Charge. In doing so, it provided thousands of pages of supporting exhibits to that response. Walmart does the same here providing the same relevant documents related to the same straightforward issues relating to this Charge. With respect to your additional requests for information and documents as described in your September 23, 2013 email (which are virtually identical to your previous discovery requests in Charge 16-CA-108934), Walmart incorporates here its previous responses in its September 10 supplemental response to that Charge as set forth in full. As for any requests that may differ, Walmart responds as follows:

1. a. Records of the named employees notifying the Employer of their (b) (6), (b) (7)(C) strike related absences and return from strike.

b. Records showing which days the employees were scheduled to work during the (b) (6), (b) (7)(C) strike.

c. Disciplinary records for the named employees associated with absences in (b) (6), (b) (7) and (b) (6), (b) (7) 2013.

Response: Walmart provided documents in response to this request as exhibits to its position statement to this Charge.

2. a. Hierarchy and Managerial Structure Information. A description of the chain of command from first-line supervisors to the CEO, including directories and charts retained by the Employer.

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[3] To the extent, the 10 JWO Associates (as well as the previous 51 JWO Associates) engaged in unlawful recognitional/organizational picketing in violation of Section 8(b)(7)(C) during the Ride for Respect, the Act does not protect such picketing and Walmart had no obligation to reintstate them. *See e.g., Executive Management Services, Inc.*, 355 NLRB No. 33, *1 (2011); *Mackay Radio and Telegraph Co., Inc.*, 96 NLRB 740, 743 (1951) (employees engaged in action to compel an employer to violate a "clear congressional mandate" such as Section 8(b)(7)(C)) may not claim the Act's protections).

Response: Walmart incorporates its September 10, 2013 supplemental response to Charge 16-CA-108394 as set forth in full.

b. Information about the Employer's Internal Communications Systems.

Response: Walmart incorporates its September 10, 2013 supplemental response to Charge 16-CA-108394 as set forth in full.

c. Results of searches in the Employer's electronic document storage system(s) for the following search words: (i) OUR Walmart; (ii) Union(s); (iii) UFCW; (iv) Strike; (v) Black Friday; and (vi) the names of each alleged discriminatee.

Response: Walmart incorporates its September 10, 2013 supplemental response to Charge 16-CA-108394 as set forth in full.

d. Records of meetings and materials prepared for meetings in which managers/supervisors/agents discussed the issues of OUR Walmart, the UFCW, strikes or other potentially protected concerted activity. Such documents would include, but not be limited to "talking points," "agendas, or other materials prepared for such meetings.

Response: Walmart incorporates its September 10, 2013 supplemental response to Charge 16-CA-108394 as set forth in full.

e. Attendance Tracking Program information.

Response: Walmart incorporates its September 10, 2013 supplemental response to Charge 16-CA-108394 as set forth in full.

f. Documents reflecting a change in attendance policy.

Response: Walmart incorporates its September 10, 2013 supplemental response to Charge 16-CA-108394 as set forth in full.

g. Discriminatee disciplinary records: For the period of July 1, 2011 to July 1, 2013, please provide all discipline and attendance records for the alleged discriminatees.

Response: Walmart believes the Region meant to title this heading as "Alleged Discriminatee disciplinary records." Walmart provided documents in response to this request as exhibits to its position statement to this Charge.

h. For the period of July 1, 2011 to July 1, 2013, please provide attendance records of the alleged discriminatees' coworkers.

Response: Walmart will provide comparator data for similar attendance discipline given to similarly-situated associates to the extent it has not given such data.

i. Lists detailing OURWalmart affiliation.

Response: Walmart incorporates its September 10, 2013 supplemental response to Charge 16-CA-108394 as set forth in full.

j. Any evidence of disruptive effect on the Employer's operations caused by the absence of the named and unnamed employees from work on their scheduled work days. This is

not a request for evidence of disruption caused by demonstrations, although you are free to provide evidence on that subject.

Response: Walmart incorporates its September 10, 2013 supplemental response to Charge 16-CA-108394 as set forth in full.

k. All evidence of efforts by the Employer to replace these striking workers.

Response: Walmart incorporates its September 10, 2013 supplemental response to Charge 16-CA-108394 as set forth in full.

l. Board affidavits from all managers involved in the making the decision to discipline or discharge the named and unnamed employees for their strike-related absences.

Response: Walmart respectfully declines the opportunity to provide manager Board affidavits.

IV. CONCLUSION.

For the foregoing reasons, Walmart did not violate the Act as alleged, and the Company respectfully requests that the Region dismiss the Charge absent withdrawal. Please contact us with any questions or if you require additional information.[4]

Kind regards,

Steven D. Wheeless
Alan Bayless Feldman

[4] Walmart submits the information in this letter for the sole purpose of resolving OURWalmart's Charge. Walmart specifically reserves all rights and defenses (including procedural, Noel Canning, and Vacancy Act issues) that it now has or may later possess concerning the Charge or related issues. Walmart further requests that the NLRB keep all information related to OUR Walmart's Charge confidential to the fullest extent permitted by law.

From: (b) (6), (b) (7)(C)
Sent: Thursday, July 24, 2014 1:43 PM
To: Guerrero, Maria
Subject: Fwd: (b) (6), (b) (7)(C) Document
Attachments: (b) (6), (b) (7)(C) .docx

---------- Forwarded message ----------
From: (b) (6), (b) (7)(C)
Date: (b) (6), (b) (7)(C), 2014
Subject: (b) (6), (b) (7)(C)
To: maria.guerrero@nlrb.gov

Hello Maria,

Attached is the document that (b) (6), (b) (7)(C) sent to (b) (6), (b) (7)(C)

--
(b) (6), (b) (7)(C)

--
(b) (6), (b) (7)(C)

From: Lockwood, Aaron <alockwood@steptoe.com>
Sent: Tuesday, July 29, 2014 11:49 AM
To: Guerrero, Maria
Cc: Katz, Lawrence
Subject: Sam's Club / Charge No. 13-CA-129860: Response to Follow-up Inquiries
Attachments: Discharge Exit Data.XLS; Discharge Coaching Data.XLS; Comparator Coaching Data.XLS

Ms. Guerrero:

I write in response to your email requests for: (1) the disciplinary file for the similarly-situated associates identified in Sam's Club's July 14 position statement; and (2) an explanation of the delays between (a) [redacted] profane outburst directed toward another associate on [redacted] 2013 and the issuance of [redacted] third-written coaching on [redacted], and (b) [redacted] threatening and retaliatory misconduct directed toward another associate in late November 2013 and [redacted] discharge on [redacted], 2014. Please let me know if you have any questions after reviewing the attached information and following answers.

I. SAM'S CLUB'S ELECTRONIC DISCIPLINARY RECORDS FOR SIMILARLY-SITUATED ASSOCIATES.

Sam's Club does not maintain hard-copy disciplinary files. Rather, the Company tracks the issuance of discipline, or "coachings," in an electronic database called the Coaching for Improvement System. To create a coaching record, a manager enters the pertinent information into the database and meets with the associate to review it. The associate then logs into the database using his or her user ID and password, and either acknowledges or refuses to acknowledge the coaching by affirmatively checking a box. By doing so, the associate effectively "signs" the disciplinary record. At that time, the associate also has the opportunity to enter comments about the coaching into the "Action Plan" field, as [redacted] did for [redacted] second and third-written coachings. [*See* Tabs 9, 12 to Sam's Club's July 14 Position Statement.]

The Company tracks discharges and exit-interview information in a separate database. Like the coaching system, a manager enters the pertinent information into the database and meets with the associate to review it at the time of discharge. The associate then logs into the database and can either acknowledge or refuse to acknowledge the electronic discharge record. In this case, [redacted] refused to acknowledge [redacted] exit interview in the online system. [*See* Tab 18.]

Accordingly, the Company created the coaching and exit-interview forms provided with its position statement after the fact by printing them from these databases. These forms are not created at the time of the discipline or discharge, and they reflect only most, but not all, information captured in the underlying databases. Therefore, to provide the additional comparator information that you requested in the most efficient and fulsome manner, I attach three Excel spreadsheets reflecting the data exported directly from the coaching and discharge databases.

Specifically, the file called "Comparator Coaching Data" provides the underlying data for the three coachings identified at Tab 19 to Sam's Club's position statement. The files called "Discharge Coaching Data" and "Discharge Exit Data" provide the coaching and exit-interview information for the seven other discharges for "Misconduct With Coachings" identified at Tab 20, pages 1-2. I deleted

from these spreadsheets only columns containing no data or disclosing last names, home addresses and telephone numbers, birth dates, or other sensitive personal information out of respect for the privacy of these associates.

II. SAM'S CLUB'S INVESTIGATIONS LEADING TO [redacted] THIRD-WRITTEN COACHING AND DISCHARGE.

As set forth in the Company's position statement, [redacted] engaged in disruptive, profane behavior in front of other associates and customers on [redacted] 2013. [*See* Position Statement at 3.] In response, [redacted] initiated an investigation into the incident and collected witness statements from management and hourly associates. [*See, e.g.*, Tabs 10-11.] Unlike a time-clock or cash-register discrepancy that can be investigated relatively quickly using Company records, [redacted] outburst involved interviewing several potential witnesses to determine what had happened and what was said. Indeed, the Company generally requires corroborating statements, and two conflicting recollections of an event, standing alone, will not justify discipline. Here, [redacted] investigation lasted through the week ending [redacted] and management sought [redacted] input when [redacted] returned to work on the following [redacted].

Club management then contacted then-[redacted] to conduct a consistency check to ensure the proposed discipline matched discipline recently issued for similar misconduct at clubs throughout the market. Once [redacted] approved the coaching, [redacted], then-[redacted] coordinated with [redacted] schedule to meet with [redacted] and issue the coaching during [redacted] shift on [redacted]. [Tab 12.]

Also as set forth in the Company's position statement, [redacted] again engaged in misconduct in late [redacted] 2013 by intimidating and harassing another associate who [redacted] erroneously believed had written a statement in connection with [redacted] investigation of [redacted] outburst. [*See* Position Statement at 4.] In response, [redacted] again initiated an investigation into [redacted] conduct and collected witness statements. [*See, e.g.*, Tabs 14-16.] Following the club-level investigation, [redacted] again contacted [redacted] for approval to issue the next level of discipline. In turn, [redacted] elevated the issue to regional and home-office management because [redacted] faced discharge if disciplined again during [redacted] active third-written coaching.

During this process, [redacted] started a leave of absence on [redacted] 2013, and did not return to work until [redacted] 2014. [Tab 17.] Because of [redacted] leave of absence and the press of the busy holiday season, the Company's regional and home-office teams did not review and approve the proposed discipline as fast they otherwise might have. Consequently, [redacted] received approval for the proposed discipline on [redacted] or [redacted] 2014. [redacted] and [redacted] then discharged [redacted] on [redacted]. [Tab 18.]

In short, Sam's Club acted quickly, but diligently, to ensure the justified and consistent administration of its progressive disciplinary policy. Indeed, setting aside [redacted] absence in [redacted] 2013, the Company took about [redacted] (slightly more for the discharge) to investigate and issue both [redacted] coaching and discharge – a length of time not out of the ordinary for this process.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 13
209 S La Salle St Ste 900
Chicago, IL 60604-1443

Agency Website: www.nlrb.gov
Telephone: (312)353-7570
Fax: (312)886-1341

July 31, 2014

(b) (6), (b) (7)(C)
[redacted]

Re: Wal-Mart Stores/Sam's Club
Case 13-CA-129860

Dear (b) (6), (b) (7)(C):

We have carefully investigated and considered your charge that Wal-Mart Stores/Sam's Club has violated the National Labor Relations Act.

Decision to Dismiss: First, you alleged that the Employer interrogated employees about their protected concerted and union activities and interfered with employees protected concerted union activities in violation of Section 8(a)(1). The evidence is insufficient to prove that any of the alleged statements occurred within 6 months before the filing and service of the instant charge. Therefore, Section 10(b) of the National Labor Relations Act bars further proceedings on this portion of your charge. Second, you alleged that you were discharged in violation of Section 8(a)(1) & (3) of the Act. However, the evidence is insufficient to show that you were discharged for your protected concerted or union activities, or for reasons other than those advanced by the Employer.

Your Right to Appeal: You may appeal my decision to the General Counsel of the National Labor Relations Board, through the Office of Appeals. If you appeal, you may use the enclosed Appeal Form, which is also available at www.nlrb.gov. However, you are encouraged to also submit a complete statement of the facts and reasons why you believe my decision was incorrect.

Means of Filing: An appeal may be filed electronically, by mail, by delivery service, or hand-delivered. Filing an appeal electronically is preferred but not required. The appeal MAY NOT be filed by fax or email. To file an appeal electronically, go to the Agency's website at www.nlrb.gov, click on **E-File Documents,** enter the **NLRB Case Number**, and follow the detailed instructions. To file an appeal by mail or delivery service, address the appeal to the **General Counsel** at the **National Labor Relations Board, Attn: Office of Appeals, 1099 14th Street, N.W., Washington D.C. 20570-0001**. Unless filed electronically, a copy of the appeal should also be sent to me.

Appeal Due Date: The appeal is due on **August 14, 2014**. If the appeal is filed electronically, the transmission of the entire document through the Agency's website must be completed **no later than 11:59 p.m. Eastern Time** on the due date. If filing by mail or by delivery service an appeal will be found to be timely filed if it is postmarked or given to a delivery service no later than August 13, 2014. **If an appeal is postmarked or given to a delivery service on the due date, it will be rejected as untimely**. If hand delivered, an appeal must be received by the General Counsel in Washington D.C. by 5:00 p.m. Eastern Time on the

appeal due date. If an appeal is not submitted in accordance with this paragraph, it will be rejected.

Extension of Time to File Appeal: The General Counsel may allow additional time to file the appeal if the Charging Party provides a good reason for doing so and the request for an extension of time is **received on or before August 14, 2014.** The request may be filed electronically through the ***E-File Documents*** link on our website www.nlrb.gov, by fax to (202)273-4283, by mail, or by delivery service. The General Counsel will not consider any request for an extension of time to file an appeal received after August 14, 2014, **even if it is postmarked or given to the delivery service before the due date**. Unless filed electronically, a copy of the extension of time should also be sent to me.

Confidentiality: We will not honor any claim of confidentiality or privilege or any limitations on our use of appeal statements or supporting evidence beyond those prescribed by the Federal Records Act and the Freedom of Information Act (FOIA). Thus, we may disclose an appeal statement to a party upon request during the processing of the appeal. If the appeal is successful, any statement or material submitted with the appeal may be introduced as evidence at a hearing before an administrative law judge. Because the Federal Records Act requires us to keep copies of case handling documents for some years after a case closes, we may be required by the FOIA to disclose those documents absent an applicable exemption such as those that protect confidential sources, commercial/financial information, or personal privacy interests.

Very truly yours,

/s/ Daniel N. Nelson

DANIEL N. NELSON
Acting Regional Director

Enclosure

cc: (b) (6), (b) (7)(C)
Wal-Mart Stores/Sam's Club
2601 S Cicero Avenue
Cicero, IL 60804

AARON J. LOCKWOOD
STEPTOE & JOHNSON LLP
201 EAST WASHINGTON ST, STE 1600
PHOENIX, AZ 85004-2382

Lawrence A. Katz, Attorney at Law
Steptoe & Johnson, LLP
201 E Washington St Ste 1600
Phoenix, AZ 85004-2382

mg/djs

Form NLRB–4767

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

APPEAL FORM

To: General Counsel
Attn: Office of Appeals
National Labor Relations Board
Room 8820, 1099 - 14th Street, N.W.
Washington, DC 20570-0001

Date:

Please be advised that an appeal is hereby taken to the General Counsel of the National Labor Relations Board from the action of the Regional Director in refusing to issue a complaint on the charge in

_____

Case Name(s).

_____

Case No(s). *(If more than one case number, include all case numbers in which appeal is taken.)*

_____

(Signature)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 13
209 S La Salle St Ste 900
Chicago, IL 60604-1443

Agency Website: www.nlrb.gov
Telephone: (312)353-7570
Fax: (312)886-1341

July 31, 2014

(b) (6), (b) (7)(C)
[redacted]

Re: Wal-Mart Stores/Sam's Club
Case 13-CA-129860

Dear (b) (6), (b) (7)(C):

We have carefully investigated and considered your charge that Wal-Mart Stores/Sam's Club has violated the National Labor Relations Act.

Decision to Dismiss: First, you alleged that the Employer interrogated employees about their protected concerted and union activities and interfered with employees protected concerted union activities in violation of Section 8(a)(1). The evidence is insufficient to prove that any of the alleged statements occurred within 6 months before the filing and service of the instant charge. Therefore, Section 10(b) of the National Labor Relations Act bars further proceedings on this portion of your charge. Second, you alleged that you were discharged in violation of Section 8(a)(1) & (3) of the Act. However, the evidence is insufficient to show that you were discharged for your protected concerted or union activities, or for reasons other than those advanced by the Employer.

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Appeal Due Date: The appeal is due on **August 15, 2014**. If the appeal is filed electronically, the transmission of the entire document through the Agency's website must be completed **no later than 11:59 p.m. Eastern Time** on the due date. If filing by mail or by delivery service an appeal will be found to be timely filed if it is postmarked or given to a delivery service no later than August 14, 2014. **If an appeal is postmarked or given to a delivery service on the due date, it will be rejected as untimely**. If hand delivered, an appeal must be received by the General Counsel in Washington D.C. by 5:00 p.m. Eastern Time on the

appeal due date. If an appeal is not submitted in accordance with this paragraph, it will be rejected.

Extension of Time to File Appeal: The General Counsel may allow additional time to file the appeal if the Charging Party provides a good reason for doing so and the request for an extension of time is **received on or before August 15, 2014.** The request may be filed electronically through the ***E-File Documents*** link on our website www.nlrb.gov, by fax to (202)273-4283, by mail, or by delivery service. The General Counsel will not consider any request for an extension of time to file an appeal received after August 15, 2014, **even if it is postmarked or given to the delivery service before the due date**. Unless filed electronically, a copy of the extension of time should also be sent to me.

Confidentiality: We will not honor any claim of confidentiality or privilege or any limitations on our use of appeal statements or supporting evidence beyond those prescribed by the Federal Records Act and the Freedom of Information Act (FOIA). Thus, we may disclose an appeal statement to a party upon request during the processing of the appeal. If the appeal is successful, any statement or material submitted with the appeal may be introduced as evidence at a hearing before an administrative law judge. Because the Federal Records Act requires us to keep copies of case handling documents for some years after a case closes, we may be required by the FOIA to disclose those documents absent an applicable exemption such as those that protect confidential sources, commercial/financial information, or personal privacy interests.

Very truly yours,

/s/ Daniel N. Nelson

DANIEL N. NELSON
Acting Regional Director

Enclosure

cc: (b) (6), (b) (7)(C)
Wal-Mart Stores/Sam's Club
2601 S Cicero Avenue
Cicero, IL 60804

AARON J. LOCKWOOD
STEPTOE & JOHNSON LLP
201 EAST WASHINGTON ST, STE 1600
PHOENIX, AZ 85004-2382

Lawrence A. Katz, Attorney at Law
Steptoe & Johnson, LLP
201 E Washington St Ste 1600
Phoenix, AZ 85004-2382

mg/djs

Form NLRB–4767

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

APPEAL FORM

To: General Counsel
Attn: Office of Appeals
National Labor Relations Board
Room 8820, 1099 - 14th Street, N.W.
Washington, DC 20570-0001

Date:

Please be advised that an appeal is hereby taken to the General Counsel of the National Labor Relations Board from the action of the Regional Director in refusing to issue a complaint on the charge in

_____

Case Name(s).

_____

Case No(s). *(If more than one case number, include all case numbers in which appeal is taken.)*

_____

(Signature)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

September 19, 2014

(b) (6), (b) (7)(C)

Re: Wal-Mart Stores/Sam's Club
Case 13-CA-129860

Dear (b) (6), (b) (7)(C):

This office has carefully considered the appeal from the Regional Director's refusal to issue complaint. We agree with the Acting Regional Director's decision and deny the appeal substantially for the reasons in the Regional Director's letter of July 31, 2014. The appeal contends that the investigation was inadequate because the Regional Office did not contact witnesses to verify your charge. Our review of the investigatory files shows that the Regional Office's investigation was adequate to resolve all issues raised by the charges. The Regional Director properly based the dismissal on the evidence adduced during the investigation, which included personnel records, and the case law. Accordingly, further proceedings on the allegations raised on appeal are unwarranted.

Sincerely,

Richard F. Griffin, Jr.
General Counsel

By: Deborah M.P. Yaffe

Deborah M.P. Yaffe, Director
Office of Appeals

cc: PETER SUNG OHR
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
209 S LA SALLE ST STE 900
CHICAGO, IL 60604-1443

LAWRENCE A. KATZ
ATTORNEY AT LAW
STEPTOE & JOHNSON, LLP
201 EAST WASHINGTON ST STE 1600
PHOENIX, AZ 85004-2382

(b) (6), (b) (7)(C)
WAL-MART STORES/SAM'S CLUB
2601 S CICERO AVE
CICERO, IL 60804

AARON J. LOCKWOOD
ATTORNEY AT LAW
STEPTOE & JOHNSON, LLP
201 EAST WASHINGTON ST STE 1600
PHOENIX, AZ 85004-2382

lmr

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

Corrected Letter

December 9, 2014

(b) (6), (b) (7)(C)
[redacted]

Re: Wal-Mart Stores/Sam's Club
Case 13-CA-129860

Dear (b) (6), (b) (7)(C):

This office has carefully considered the appeal from the Regional Director's refusal to issue complaint. We agree with the Acting Regional Director's decision and deny the appeal substantially for the reasons in the Regional Director's letter of July 31, 2014. The appeal contends that the investigation was inadequate because the Regional Office did not contact witnesses to verify your charge. Our review of the investigatory files shows that the Regional Office's investigation was adequate to resolve all issues raised by the charges. The Regional Director properly based the dismissal on the evidence adduced during the investigation, which included personnel records, and the case law. Accordingly, further proceedings on the allegations raised on appeal are unwarranted.

Sincerely,

Richard F. Griffin, Jr.
General Counsel

By: Deborah M.P. Yaffe

Deborah M.P. Yaffe, Director
Office of Appeals

cc: PETER SUNG OHR
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
209 S LA SALLE ST STE 900
CHICAGO, IL 60604-1443

LAWRENCE A. KATZ
ATTORNEY AT LAW
STEPTOE & JOHNSON, LLP
201 EAST WASHINGTON ST STE 1600
PHOENIX, AZ 85004-2382

(b) (6), (b) (7)(C)
WAL-MART STORES/SAM'S CLUB
2601 S CICERO AVE
CICERO, IL 60804

AARON J. LOCKWOOD
ATTORNEY AT LAW
STEPTOE & JOHNSON, LLP
201 EAST WASHINGTON ST STE 1600
PHOENIX, AZ 85004-2382

lmr